MANIA K. BAGHDADI
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
THOMAS J. DOUGHERTY, JR.
JAMES G. ENNIS
RICHARD HILDRETH
EDWARD W. HUMMERS, JR.
FRANK R. JAZZO
BARRY LAMBERGMAN
PATRICIA A. MAHONEY
GEORGE PETRUTSAS
ROBERT D. PRIMOSCH
LEONARD R. RAISH
JAMES P. RILEY
DAVID N. ROBERTS*
MARVIN ROSENBERG
LONNA M. THOMPSON
HOWARD M. WEISS
*ADMITTED IN TEXAS ONLY

FLETCHER, HEALD & HILDRETH
ATTORNEYS AT LAW
SUITE 400, 1225 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036-2679

P. O. BOX 33847
WASHINGTON, D.C. 20033-0847

(202) 828-5700
TELECOPIER NUMBER
(202) 828-5786

PAUL D.P. SPEARMAN
(1936-1962)
FRANK ROBERSON
(1936-1961)

RETIRED
RUSSELL ROWELL
EDWARD F. KENEHAN
ROBERT L. HEALD
FRANK U. FLETCHER

TELECOMMUNICATIONS CONSULTANT
HON. ROBERT E. LEE

WRITER'S NUMBER
(202) 828-

June 29, 1992

ORIGINAL
FILE

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: P.R. Docket No. 92-80

Dear Ms. Searcy:

Transmitted herewith, pursuant to Commission Rule 1.419, are an original and nine copies of the comments of Fletcher, Heald & Hildreth on the Notice of Proposed Rulemaking in P.R. Docket No. 92-80, FCC 92-173 (rel. May 8, 1992). The additional five copies of these Comments are intended for delivery to the Commissioners.

Please contact the undersigned if additional information on these Comments is desired.

Respectfully submitted,

Thomas J. Dougherty, Jr.
a Partner in
Fletcher, Heald & Hildreth

TJD/dd
Enclosures

cc: Mr. Roy Stewart
Ms. Karen Kincaiud
Ms. Rosalind Allen
Mr. Bruce Romano
[all w/enclosure - By Hand]

No. of Copies rec'd 0+9
List A B C D E

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

JUN 29 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Parts 1, 2 and 21 of	)	P.R. Docket No. 92-80
the Commission's Rules Governing	)	R.M. 7909
Use of the Frequencies in the 2.1	)	
and 2.5 Ghz Bands	)	

Directed To: The Commission

COMMENTS
ON NOTICE OF PROPOSED RULEMAKING

Thomas J. Dougherty, Jr.
FLETCHER, HEALD & HILDRETH
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 828-5700

June 29, 1992

TABLE OF CONTENTS

SUMMARY

Fletcher, Heald & Hildreth ("FHH"), which represents many participants in the wireless cable industry, supports the Commission's desire to help the industry. Some of the proposals are for good and needed changes, some proposals are potentially damaging to the industry and some proposals should be extended farther than proposed to enhance their effectiveness.

The wireless cable industry, has to some extent, suffered from regulation that is not conducive to it; however, the industry would be a lot farther along today despite adverse regulation if the combination of a lending crisis and a deep and lasting recession did not exist. As lack of financing is the main barrier to more and better-run wireless cable operations, the Commission must make sure that those rule changes it makes do not destroy the need for regulatory stability investors require.

The proposal to move the initial processing of MDS applications to Gettysburg may be beneficial. The proposal to conduct final application processing at Gettysburg is asking too much of Gettysburg and could turn into a disaster. We understand that the Common Carrier Bureau is no longer interested in regulating MDS. If that is the case, now is the time to recognize that MDS is mass media, that it is intertwined with other mass media services and that, accordingly, it should be regulated as a mass media service by the Mass Media Bureau.

The proposals to simplify the MDS channel assignment rules will hurt the industry. Those rules assume, falsely, that the population centers of this country are neatly laid out at the insections of lines of a fifty mile grid overlay upon a continental map. People, in good faith reliance upon the Commission's rules, have proposed wireless systems and have built such systems that they could not build under the proposed rules changes. The idea of turning back the hands of time, imposing a mileage separation scheme for channel assignments and dismissing non-compliant applications will, if implemented, destroy investor confidence in wireless cable and thereby destroy it as a business. That is not how the Commission should be seeking to expedite the licensing of MDS systems.

Expanding ITFS receiver protection to those receivers registered at the time that a MDS application is granted is unfair and invites abusive filings.

Banning partial market MDS application settlements is a start. The ban, however, should be extended to full market settlements to ensure that hapless applicants are not duped by filing mills and to avoid the need to process additional paper that helps no one but the filing mill. Further, MDS applicants should be required to certify that they are not knowingly filing mutually-exclusive applications.

The proposals to simplify the application form are good proposals.

The idea of one MDS system per RSA is too late and would be harmful in its implementation.

Finally, if the Commission really wants to help wireless cable, it should take heed of what we and many others have been telling it for some time. That is, aggressively pursue those who abuse the ITFS application processes. Stop the abuse or suffer abuse as the norm, rather than the unusual.

101/sum

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 2 and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 Ghz Bands	)	P.R. Docket No. 92-80 R.M. 7909

Directed To: The Commission

COMMENTS
ON NOTICE OF PROPOSED RULEMAKING

FLETCHER, HEALD & HILDRETH ("FHH"), on behalf of its various wireless cable clients, hereby submits these comments on the Notice of Proposed Rulemaking (the "Notice") in the above captioned docket. In regard thereto, the following is respectfully submitted:

I. INTEREST IN PROCEEDING; QUALIFICATIONS

FHH represents nearly as many MDS and ITFS licensees and wireless cable operators as any other law firm.[1] This representation spans many years, including those years when the

[1] FHH represents the whole host of legitimate players in the industry. Those clients include wireless cable operators, such as Fort Wayne Telsat, Inc., Fresno MMDS Associates, Cardiff Broadcasting Group and its various operating subsidiaries (serving Yuma, AZ, Redding, CA, Sheridan, WY, among other markets), Snyder Microwave Communications, L.C., BCW Systems, Inc., Magnavision Corporation, Microwave Television, Inc., 720 Wireless and Broadcast Cable, Inc. Our licensee clients include Via/Net Companies, which is a pioneer of MMDS technology, Caribbean MMDS Partnership, and a host of independent other entities. Our ITFS clients include the University of Maryland.

only MDS channels allocated were MDS Channels 1 and 2. Moreover, unlike almost any other firm significantly involved in this industry, FHH has acted as general counsel in the negotiation, document preparation and closing of financing for wireless cable deals. On top of that work, we have represented wireless cable operators in their attempts to obtain financing, being called upon as experienced and well-known counsel in the area of communications finance. Understanding financing is critical to understanding the impact of proposed regulations upon a developing and reputation-building industry, such as the wireless cable industry.

Our substantial and significant representation of those interests over such a relatively long term has provided us with a hands-on and excellent understanding of the parties, the interests, the economics and, last but not least, the regulatory forces affecting and shaping the wireless cable industry. It is with that understanding that we have studied the Notice and that we offer these comments.

We are aware, nonetheless, that certain operating bureau staff members have urged upon the Commissioners the notion that comments by communications attorneys against certain portions of the Notice are baseless attempts by attorneys to preserve to themselves the ability to earn a living off the industry. The undersigned has heard that comment and regards it as invective and as indicative of a lack of good refutation to arguments those staff

members find unpopular. The object of the Notice is to help the industry. Those who would assail arguments against particular aspects of the proposal solely because of the source and not because of the substance invite the very criticism that must be in the minds of any astute observer--that is, if you assail the speaker rather than the message, then you must have no rational basis upon which to assail the message. It is our hope that the Commission, in its desire to help the industry, will listen to the industry, will learn from the industry and will ignore comments from those who lack the experience to really know what drives and impedes the industry.

II. DISCUSSION

A. Why Has the Development of the Industry Lagged?

The stated goal of the Notice is to help the wireless industry; a lofty and noble pursuit. Yet, to hope to achieve that goal, one must understand the problems that have impeded the development of the industry. The Commission asks itself why there are not more operating wireless cable systems. The Commission, being the licensing organization, cites its own failings. Certainly there are areas where improvements can be made; however, the Commission must place the problem within a larger perspective. That is the focus of this portion of these Comments.

1. The National Economy. The condition of the national economy is the primary barrier to the development of wireless cable systems. As the Commission is well aware, the deep and sustained national economic recession has been coupled, unlike other recessions, with a commercial credit crisis. While new industries, like wireless cable, are typically considered unknown and, therefor, unsupportable credit risks by institutional lenders, the credit crisis has magnified that attitude to the point that few wireless cable systems have been financed with institutional credit. The Commission needs to keep in mind that seed debt capital drove the development of communications and other industries throughout the 1980s. Without debt capitalization, a business must rely upon equity for its financing. Yet, such heavy reliance upon equity begets a low return on equity because of poor leverage.[2] As a result, potential investors in wireless cable (a haplessly debt-free industry) are less likely to pick it over other investments.

The magnitude of the credit crunch problem for the development of wireless cable is quite large because the cost of building and operating a wireless cable system is quite high. The wireless cable head-end alone costs near or over $1,000,000 and the cost of subscriber installations is about $400 per successful

---

[2] "Leverage" is the ratio of a business's indebtedness to its paid in equity capital. The higher the leverage ratio, the better the return on equity, assuming other variables are held constant and assuming the ability to service debt with cash flow.

installation.[3] Thus, large start-up capital--such as $3,500,000 to $10,000,000--is needed to begin a wireless cable operation. It takes little in the way of understanding the current and quite protracted bank and S&L crises to understand as do we in the industry that wireless cable is not impeded so much by regulatory policy as by a lending crisis coupled (quite unusually) with a deep recession.

2. Programming Unavailability. Until quite recently, the major cable movie networks--HBO and Showtime--would not sell their programming to wireless cable operators. ESPN, as well, refused to deal with wireless cable operators. TNT's policy remains not to serve any wireless cable operators. Those refusals to deal not only placed wireless cable at a great competitive disadvantage vis-a-vis cable TV companies, they also discouraged the investment of capital required to develop wireless cable systems. Quite simply, who in their right mind would invest substantial capital into a company seeking to compete head-to-head with cable TV when the company cannot offer the major movie channels, ESPN (with its NFL package) or TNT? Fortunately, the movie channels now sell to wireless cable and ESPN is beginning to enter into contracts with wireless cable operators. Still, TNT holds firm to its no-sale policy and the rates charged to wireless

---

[3] This cost includes all the subscriber equipment and the cost of advertising to gain the subscriber. This cost reflects the experience of our clients.

cable operators by programmers are significantly higher than those charged to comparably sized cable TV companies.

3. Incompatible Regulatory Schemes. Prior to January 2, 1992 when the Second Report and Order in General Docket No. 90-54[4] became fully effective, the 3 H-group channels were licensed on an entirely different basis than the 10 MDS and 20 ITFS channels. As a result, it was common for a wireless cable operator to gain access to many of the MDS and ITFS channels, yet have no ability to obtain authorization of the 3 H-group channels to operate from the ITFS/MDS transmitter site. Prior to 1992, an H-group channel was available at any location separated by over 50 miles from all previously proposed cochannel H-group stations. Thus, a wireless cable operator often found that it could not obtain licenses to use the H-group channels at the wireless cable transmitter site because of the licensing of H-group channels to operate at sites 45 to 49 miles away, even though there was no theoretical interference basis for that prohibition. Similarly, the Private Radio Bureau imposed an "anti-gluttany" rule that prohibited a H-group channel licensee from receiving authorization of transmitters within 50 miles of one of the licensee's cochannel stations. The Private Radio Bureau refused to waive that processing rule, despite demonstrated needs and benefits to wireless cable systems. That policy, thus, also hindered the development of wireless cable.

---

[4] FCC 91-302 (rel. October 25, 1991).

4. Need to Program ITFS Channels with Educational Material. Rule 74.931(e) has required ITFS licensees to program each channel at least 20 hours per week with programming used to educate students as a condition to the lease of the excess capacity of the channel to a wireless cable operator. That Rule hampered the usefulness of ITFS channels for wireless cable service. The Commission, in recognition of that problem, attempted to relieve it by allowing ITFS licensees to lease channel capacity if only 12 hours a week, per channel of capacity is used for educational purposes; however, that relaxation of the 20 hour per week minimum only applies during the first two years of operation.[5] In another attempt of questionable utility to relax the restrictions on the wireless cable use of ITFS channels, the Commission promulgated rules allowing wireless cable entities to apply for and receive licenses to use up to 8 ITFS channels in an area without the corresponding obligation to use those channels a minimum amount of time in an educational pursuit.[6] But, an application for such a license must appear on a 60 day cut-off notice and will be dismissed if it is subject to a mutually-exclusive application filed by an educator. No such application proposing a station of any potential value can hope to survive a 60-day public notice without suffering a competing filing by an educator spurred and supported by a speculator.

---

[5] Order on Reconsideration in Gen. Dkt. Nos. 80-113 and 90-54, FCC 91-301, at Appendix B, page 46 (rel. Oct. 25, 1991).

[6] Second Report and Order, at para. 42-58.

5. Substantial Over-Regulation of ITFS Excess Capacity Lease Agreements. ITFS excess capacity lease agreements are subject to regulatory restrictions that are anachronistic in this day of de-regulation and harmful to the leasing wireless cable operator. For example, the ITFS channel licensee is prohibited from leasing excess channel capacity for more than 10 years.[7] The excess capacity lease agreement must leave the ITFS licensee free to assign the ITFS station license to a third party without also causing that third party to assume the obligations of the channel lessor under the lease.[8] Those and other ITFS channel capacity lease restrictions make ITFS lease agreements too insecure for many potential investors in wireless cable.

6. Application Mills. The plethora of MMDS applications filed by filing mills after the freeze on the filing of MMDS applications was lifted in 1988[9] has placed new and often unbeneficial demands upon the Commission's processing line. Moreover, the grossly exaggerated value these mills attribute to MMDS licenses to solicit application clients leads its applicant/clients to ask grossly unrealistic lease payments from

---

[7] Report and Order in Gen. Dkt. Nos. 80-113 and 90-54, FCC 90-341, at para. 40 (rel. Oct. 26, 1990).

[8] See Instructional Television Fixed Service, 58 R.R.2d 559, 585 (1985).

[9] "Common Carrier Bureau Opens Filing Period for MultiChannel Multipoint Distribution Service Applications," Public Notice, DA 88-562 (rel. April 20, 1988).

wireless cable operators for the capacity of these channels. As a result, channels licensed by filing mill-filed applications tend to lie fallow while the duped licensee wonders why the wireless cable operator will not agree to the licensee's ridiculous terms.

7. Abusive ITFS Filings and Unwillingness of the Commission to Take Action Against Those Filings. Anyone who has substantial experience in the wireless cable industry knows of RuralVision, its abuses of process in ITFS applications filed by its proxy school systems, and other ITFS speculators who make filings to extort money from serious wireless cable operators. RuralVision's antics are chronicled in pleadings filed by FHH and other law firms.[10] Among those antics are (i) RuralVision's amendment of the ITFS applications filed by its school/proxies without the knowledge or consent of the school/proxies; (ii) the proposal in such amendments of receiver sites that must be protected which are quite distant from the school/applicants, of no interest to the school/applicants and which serve only to block others' attempts to receive ITFS construction permits; (iii) misrepresentations to the Commission in declarations subject to perjury laws submitted with oppositions to petitions to deny; and (iv) building ITFS station facilities for its

---

[10] See, e.g., Reply to Opposition to Petition to Dismiss or Deny et. al., concerning the application of RuralVision Central, Inc. for a conditional License for a new MDS Channel 1 station at Sikeston, MO (File No. 52030-CM-P-92) (filed June 3, 1992). A copy of this pleading is attached hereto.

school/proxy/licensees that are grossly over authorized power and antenna height. RuralVision's behavior, while involving egregious and bold abuses of process and misrepresentation, continues to go unaddressed by the Commission. In the view of observers, the Commission's unwillingness to police its own processes actually encourages the abuse of its processes and, thereby, hinders the development of wireless cable.

In brief, the causes of wireless cable's slow growth are (i) lack of financing, (ii) programming availability problems that affect subscriber satisfaction and the availability of financing, (iii) incompatible schemes for regulating the various channels used by wireless cable, (iv) the educational use requirements placed upon ITFS channels, (v) the over-regulation of ITFS excess capacity lease agreements, (vi) application mills, and (vii) abusive ITFS filings and the unwillingness of the Commission to punish such abuses. All attempts to help the wireless cable industry should address one or more of those problems and ensure that the solution is not itself a problem. In particular, any aspect of the Notice that would upset expectations will serve only to deter prospects of financing and, therefor, prospects that the involved frequencies will be put to work. The financial community, including those who offer equity capitalization, naturally require regulatory stability and temperance. The Commission must, thus, discard all aspects of the Notice that defeat reasonable expectations toward the development of wireless cable systems or which otherwise caution

financiers that investment in this industry involves risks of loss not only from competition, but from regulatory fiat.

With those premises, these Comments continue by analyzing specific proposals made by the Notice.

B. Notice's Proposals to Help the Industry.

1. Location of MDS Application Processing. In deciding the locus of initial MDS application processing and final MDS application processing, the Commission should decide the issue with the following principles in mind:

(i) the underlying applications should be maintained at one site in Washington so that the public will have easy access to the applications,

(ii) the costs to the public of retrieving applications should be minimized,

(iii) the costs to the FCC of splitting the initial and final processing of MDS applications should be reasonable and should beget gains that offset such costs, and

(iv) the final processing staff should be those best able to conduct the processing functions and to handle difficult

problems that can be expected to arise.

The conduct of initial processing should involve no more than placing certain key information concerning an application on the data base and listing the application on a public notice. This job could be accomplished in Gettysburg or in Washington. The choice of the two sites should be determined based upon costs to the Commission. If Gettysburg is chosen as the initial application processing site, it will be necessary for Gettysburg to have a data base system completely compatible with the system used by those who conduct final processing. As long as the creation and the use of that data base does not involve substantial expenditures toward software, hardware, leased telephone lines and training, or substantial lost productivity deriving from inter-Bureau interface, there appears to be no principled reason why initial application processing could not be performed in Gettysburg, regardless of where final processing is performed.

The location of final processing is intertwined somewhat with the channel assignment scheme chosen for MDS. If that scheme is quite simple to apply, then Gettysburg could be a logical candidate to perform the final processing. But, the Commission's proposals to simplify MDS licensing are not simple enough to fall within the abilities of the Gettysburg processing staff. That processing staff consists of a few already very busy engineers, no attorneys, and a large body of persons trained only in what can and

cannot appear on Forms 574 and 402. The proposals in the Notice would involve imposing on all MDS applications the mileage separation scheme that Gettysburg applied to H-group channels up until January 2, 1992, plus other new requirements. As those familiar with H-group application processing at Gettysburg know, the Gettysburg staff did not believe that such processing was suited to the processing system they employ and that staff was more than pleased to see H-group application processing reallocated to Washington. Under the Notice, MDS interference-concerned processing would expand beyond merely ascertaining the lack of co-channel stations within 50 miles to (i) considering the location of adjacent channel facilities; (ii) interfacing with the Mass Media Bureau to decide complaints that MDS stations interfere with ITFS reception;[11] (iii) performing engineering analyses to determine what MDS facilities will not cause harmful interference;[12] (iv) applying the height/power derating table;[13] (v) determining lottery preferences required by Section 309(i) of the Act; and (vi) supervising behavioral and qualifying rules applicable to MDS applicants, such as the cable/telephone company cross-ownership rule and statute[14] and such other statutorily required policies as may in the future be applied to MDS.

---

[11] Notice, at 9 n.29.

[12] Notice, at 8 n.26.

[13] Notice, at 8-9.

[14] Rule 63.54 and 47 U.S.C. 533(a), respectively.

We submit that those required minimal activities and functions are beyond the purposes for creating and maintaining a Gettysburg licensing staff and beyond its expected abilities. Moreover, as explained later in these Comments, it is our opinion that the simplistic frequency assignment rules proposed in the Notice would cause great disservice to the wireless cable industry and that more complex frequency assignment rules are required. More the reason why MDS final application processing should not be the province of the Private Radio Bureau.

Still, even if a plain and simple assignment scheme were employed, there would remain the problem that the public would not have reasonable access to the applications if Gettysburg performed final MDS application processing. Those applications would have to remain in Gettysburg. In our experience, retrieving an application processed in Gettysburg requires the use of the Commission's photocopying contractor, and that contractor is either unwilling or unable to secure application copies as rapidly as we often need those copies. The introduction of that intermediary also creates the problem that searches through application files to cull and copy relevant information is impossible. The contractor is neither willing nor able to fulfill even simple instructions regarding the review and copying of an application file. As a result, one must ask the contractor to copy the entire application file. The extra costs to the public, in both time and money, should be considered by the Commission as pertinent to its decision on the location of

final MDS application processing.

Finally, the Commission needs to keep in mind that the Gettysburg licensing staff has absolutely no knowledge of the wireless cable industry, its needs, its directions of development or its problems. Such knowledge is imperative to its proper regulation. While there are a few key personnel in Gettysburg who could eventually develop that knowledge, they have responsibilities aside from just MDS applications that will prevent them from becoming knowledgeable of the industry.

We have had good experiences with the Common Carrier Bureau and, as explained below, we believe the application backlog can be controlled merely by removing the incentive for filing mills to file multiple applications for the same facilities. Nonetheless, we have been advised informally that the Common Carrier Bureau does not desire to continue in its role as the regulator of MDS.

If that is the case, then the time is ripe for the Commission to face the fact that wireless cable is a mass media service which, over time, will be beset by many of the same regulatory concerns as affect other mass media services. It is not inconceivable, for example, that the Commission may find it necessary or prudent to apply to wireless cable the syndicated exclusivity rules now applicable to cable. Those that are

experienced in the complex regulation and political concerns of mass media services should have responsibility for final MDS application processing now.

Moreover, the existing rules and the laws of physics intertwine MDS and other mass media services to the point that inefficiency results from dividing the regulation of the services between two bureaus. Thus, wireless cable entities may apply for and receive authorizations to use up to 8 ITFS channels in an area without an immediate educational programming obligation. Further, MDS stations may use CARS stations. Significantly, almost all new ITFS construction permit applications are filed at the behest of wireless cable operators who intend to use the ITFS channels along with MDS channels. Finally, 11 of the 13 MDS frequencies are immediately adjacent to ITFS frequencies, and many of the MDS frequencies are used for ITFS and, thus, adjacent and cochannel interference concerns exist which dictate processing MDS and ITFS applications by a single staff for sake of efficiency and consistency in policies and decisions. Insofar as the Mass Media Bureau now regulates 2/3d of the total number of available wireless cable channels, it logically is the sole regulator of all such channels.

2. Frequency Assignment by Mileage Separation.

We find this proposal most troubling and, moreover, a

step backward to the days when H-group channels and other MDS channels often could not be used together due to their different channel assignment rules. The result of using fixed mileage separations will be that MDS channels often will be un-licensable at the natural and best wireless transmitter sites and that many wireless cable systems will be forced to depend entirely upon ITFS channels due to the existence of MDS stations at distant, but electrically compatible, locations. If the object of the Notice is to help wireless cable operators "to realize their competitive potential",[15] this proposal is not the way to do it.

The Notice identifies an application backlog as the problem and the use of mileage separations as a partial solution. They are not solutions, but, as explained above, new problems that we experienced before the Second Report and Order shifted H-group channel application processing to Washington and applied the existing MDS interference and channel assignment policies to H-group channels. Thus, the Notice proposes a channel licensing scheme that, once again, will result in the inability to use channels at a wireless cable transmitter site because the channels would be within 50 miles of cochannel stations, regardless of theoretical interference considerations. While the problem is no different than before, it would be of greater magnitude. Whereas before the Second Report and Order such mileage separation policies

---

[15] Notice, at 1.

affected and corrupted the use of the 3 H-channels, the Notice would extend those policies and their corruptive affects to 13 channels.

The country's population centers simply are not placed neatly at the line intersections of a 50 mile grid overlay on a country map. Thus, while simplifying the licensing policies "could help facilitate the expeditious processing of MDS applications," to quote the Notice,[16] it will not "thereby [speed] the provision of service to the public" as claimed by the Notice.[17]

The proposal to apply the 50 mile separation scheme at this juncture is a little late, whatever its benefits may be. MDS channel licenses already have been sought at locations which will cover virtually all of the populated areas of the country. Moreover, wireless cable systems in close proximity to one another already exist, are under development or are planned. Such closely situated systems exist because of a combination of factors that are considered under the current licensing regime, but which would be ignored under the scheme proposed in the Notice, such as natural terrain barriers, cardioid antenna designs and cross-polarization. To now change the rules and to dismiss pending applications that are not in conformity with those rules is to destroy the little

---

[16] At 10.

[17] Id.

legitimate investor interest in wireless cable as exists in our troubled economy. In short, the proposed change in the channel assignment rules will not be understood by voters or investors as an attempt to assist wireless cable. It will be seen as an indication of the Commission's insensitivity to investors and to investors' needs for a stable regulatory environment. Investors have agreed to invest in wireless cable on the basis of the rules as they now exist. Changing the rules in a manner that will reduce the number of planned systems that can use the 13 MDS channels could simply destroy investor confidence in wireless cable.

By simplifying the MDS channel assignment and interference protection rules as proposed in the Notice, the Commission may be able to pump out more application grants. Yet, as the experience with H-channels in Gettysburg has proved, a large percentage of the grants will be for transmitter sites that will not be the wireless cable site but any sites a speculator can find which fit the mileage separation rules and locks-up the spectrum. In other words, many grants will result in licenses of no value to anyone other than speculators and which will, additionally, create 50 mile fences to the filing of legitimate applications.

Like the situation when H-channels were licensed in Gettysburg, the Notice also invites the problem of handling interference to adjacent channels but offers no solution that would be acceptable. The solution, expressed in the Notice, is that a

MDS operator would build his station, begin operations and, if an ITFS receiver actually received interference, the MDS station would be forced to shut down and eliminate the problem.[18] We are, frankly, amazed that the Commission would believe that a MDS operator would incur the considerable expense of building a multichannel transmission facility at the risk of being forced thereafter to shut down because of an adjacent channel interference complaint. An operator willing to risk that result would be intrepid beyond the reasonable. Moreover, investors cannot be expected to invest in MDS systems when there is so great a risk that a planned operation could be destroyed.

The use of actual adjacent channel interference complaints, as opposed to considering theoretical interference prior to grant, is a radical departure from the Commission's licensing dogma and one that is inherently inefficient. For example, a MDS station begins operation and an ITFS station operator sincerely complains of interference at the port of one of its receiver antennas. The MDS station is forced to cease operation. After ceasing operation, a dispute will ensue between the parties which must be resolved (probably after considerable delay) by the Commission. All the while, however, the MDS station license's existence requires other applicants to engineer systems to protect the licensed operation (regardless of how the dispute

---

[18] Notice, at 9 n.29.